Supreme Court, U.S.
FILED
99 852 OCT 19 1999
OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

DOROTHY NEAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WAMPLER & PIERCE, P.C.
M.C. Jermann
294 Washington Street
P.O. Box 3410
Memphis, TN 38173-0410
901-523-1844

Attorney for Petitioner,
Dorothy Neal

QUESTION PRESENTED

1. When the defendant provides the government with self-incriminating information during a defendant's cooperation with the government, should that information be used in determining the applicable guideline range, except as agreed to with the government?

OPINION

On the Sixth Circuit Court of Appeals entered its opinion affirming the sentence of petitioner. A copy of said opinion is attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is fraud under the 28 U.S.S.C. § 1254 (11).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. - Guideline § 1B1.8 - which provides that self-incriminating information provided during a Defendant's cooperation with the government will not be used in determining the applicable guideline range, except as agreed to with the government.

MEMORANDUM IN SUPPORT OF PETITION

The District Court erred by using defendant's proffer statements and interviews with investigators and with the U.S. Attorney in determining her guideline range. Said statements were used despite the fact that Ms. Neal was repeatedly assured even after the signing of the proffer agreement that such statements would not be used against her. The Court of Appeals states in its opinion that since the plea agreement/proffer letter were not in the joint appendix, that the District Court was not in err in using Ms. Neal's statements in determining her guideline range. Appellant hereby requests the Court of Appeals to revisit this issue.

The Court of Appeals found that because Appellant's attorney did not provide a "...written plea agreement, or any other proof of any pertinent provision of her plea bargain..." in the joint appendix herein, that there was no evidence of plain error on the part of the sentencing court in using Ms. Neal's statements in determining her guideline range. It is the Appellant's position that such a finding fails to take into account the fact that such an agreement was referred to countless times in Ms. Neal's sentencing hearing, Further, the District Court accepted the plea agreement at the time of Appellant's guilty plea. (R.____, Appeal Transmission Form, P. 42, Ln. 246). Said agreement became part of the record at that time.

According to U.S.S.G. Guideline § 1B1.8 which provides that self-incrimination information can only be used in determining the Defendant's guideline range if AGREED to. No such agreement is in the record because such an agreement does not exist.

Further, in the Presentence Investigation Report, the officer therein reported in terms of the base level offenses:

"...the defendant estimated that during the last several years she and her husband, Paris Neal, had been involved in the possession and distribution of one kilogram of heroin per month." Using the information provided by the **defendant**, it can be conservatively **estimated** that the defendant was involved in the possession and distribution of 24 kilograms of heroin (1 kilogram of heroin per month for two years). (P. 12, Paragraph 49, Presentence Investigation). It is plain error on the part of the District Court to use this information that was obtained from the defendant during a proffer session wherein Ms. Neal was assured that same could not be used against her. The terms of the government's proffer letter were repeatedly conveyed to

Ms. Neal and counsel during all interviews and even as late as the sentencing hearings of her co-defendants.

Said proffer letter is not part of the record herein. However, at each and every report date up until the time of sentencing, counsel for Ms. Neal and for the United States approached the bench of the District Court to ask for a continuance so that the Government could continue to use Ms. Neal as an informant and that her status an informant was good.

REASONS FOR GRANTING THIS WRIT

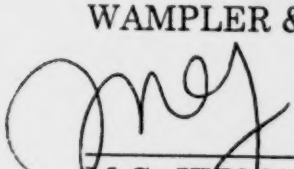
It is plain error for the District Court to accept the Presentence Investigation that literally states that the only basis for the amount of drugs used in sentencing is information given under the guise that said information will not be used against the speaker.

CONCLUSION

The Appellant respectfully submits for the forgoing reasons to reconsider its original opinion and grant this petition to rehear, and because of the exceptional importance of the issue at bar, prays for a rehearing en banc.

Respectfully submitted,

WAMPLER & PIERCE, P.C.



M.C. JERMANN, #15508
Attorney for Appellant
P.O. Box 3410
294 Washington Avenue
Memphis, TN 38173-0410
901-523-1844

APPENDIX

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, DATED JULY 19, 1999

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

PARIS NEAL, ABAYOMI OLUSOGA, EUGENE ROSS, and DOROTHY NEAL, Defendants-Appellants.

Nos. 98-5275/76/80/81

United States Court of Appeals
for the Sixth Circuit

July 19, 1999

Not Recommended for Publication

* * *

Before Krupansky, Ryan and Suhrheinrich, Circuit Judges

PER CURIAM. The defendant-appellants Paris Neal, Abayomi Olusoga ("Olusoga"), Eugene Ross ("Ross") and Dorothy Neal have each contested his or her sentence imposed following convictions entered upon guilty pleas to conspiring to commit various heroin trafficking criminal offenses. Paris Neal has challenged the district court's finding that he acted as a manager or supervisor of the subject conspiracy; Olusoga has disputed the sentencing bench's assessment of the heroin quantity attributed to him; Ross has attacked the lower court's finding that he was a "minor" rather than a "minimal" participant in the criminal enterprise; and Dorothy Neal has faulted the initial forum's failure to award her a more favorable downward departure for substantial assistance and its

usage of her statements as a cooperating informant and witness to ascertain her punishable heroin quantity and aggravating role in the offense.

Commencing sometime prior to 1994, Paris and Doróthy Neal ("the Neals") operated a large-scale heroin distribution ring in the Memphis, Tennessee area. Beginning in 1994, the Neals ceased acquiring the narcotics from local sources, instead electing to secure their supply from Paris Neal's cousin, Chris Davis, a resident of Chicago, Illinois. Sometime between January and March of 1996, the Neals met a Nigerian national named "Tony" in Chicago, who then became their primary heroin provider. In mid-October 1996, Tony advised the Neals that circumstances compelled his departure from Chicago. However he promised that his Nigerian brother-in-law, defendant Olusoga (a/k/a "Yomi"), would satisfy their future heroin demands. The Neals regularly purchased heroin from Olusoga between at least October 18, 1996 and January 17, 1997. Typically, Olusoga would dispatch pairs of drug couriers via Amtrak or a commercial airliner from Chicago to Memphis to supply the Neals.

In January 1996, agents of the United States Drug Enforcement Administration's Memphis Task Force (the "Task Force") learned that the Neals occupied the epicenter of a major heroin distribution operation. During October 1996 through January 1997, minions of the Neals, as well as Paris Neal himself, sold heroin on eleven occasions to a Task Force confidential informant. On January 17, 1997, a twelfth controlled purchase, scheduled for consummation in a parking lot, was interrupted when Paris Neal observed approaching surveillance officers, which prompted his ambulatory flight. Following a chase, law enforcement personnel captured and arrested him. They subsequently seized 24.9 grams of heroin from his parked vehicle.

On that same day, peace officers executed search warrants at two known Neal residences. At 5179 Wayfarer Circle, Apartment 3, Memphis, investigators discovered 62.8 grams of heroin in the master bedroom and kitchen, two Motorola hand-held two-way radios, hundreds of metal foil packets of the type used to package street heroin, cutting agents, a set of digital scales, and $2,283 in United States currency. At 5540 Blossom Lane, Memphis, criminal justice authorities surfaced no controlled substances, but they extracted collectively incriminating items including a set of electronic scales, numerous foil seals of the same type as those unearthed at 5179 Wayfarer Circle, two smoking pipes, an unloaded .22 caliber rifle plus 24 rounds of .22 caliber ammunition, and an additional Motorola radio.

On the day of his arrest, Paris Neal confessed to a law enforcement interviewer that he commenced heroin dealing in 1994 and that, beginning in January 1996, he received between four ounces and ½ kilogram from his Nigerian sources in Chicago approximately every seven to ten days. He estimated that he has received 20 kilograms of unadulterated heroin "in the last few years," the volume of which he doubled prior to street distribution by the admixture of fillers. Paris Neal has conceded that, prior to his confession, he waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

Subsequently, on February 13, 1997, Dorothy Neal admitted to investigators that she and her husband initially acquired heroin from local sources and then Chicago vendors; around March 1996 and thereafter they secured heroin from the Nigerian purveyors in Chicago. Dorothy Neal represented that Tony (from March 1996 until August or September 1996) and Yomi (from August or September 1996 until January 1997) provided them with between 100 and 400 grams of pure heroin per week.

She estimated that she and her spouse distributed approximately one kilogram per month "during the last few years," or a total volume between 15 and 30 kilograms; and that they employed several persons as street dealers and couriers, including co-defendants Eugene Ross, DeWayne Reed, and Harold Williams. She further related that, after diluting the heroin to about 50% purity, they packaged it in one-tenth gram units which they peddled for $20 each. She acknowledged that she and her husband were the leaders of the operation, and that they shared their net proceeds evenly.

On March 4, 1997, a federal grand jury indicted Paris Neal, Dorothy Neal, Ross, Olusoga, and five additional confederates. One June 18, 1997, the grand jury returned a twelve count superseding indictment against the same nine defendants. Count one alleged, against all defendants, participation in January 1996 to February 1997 conspiracy to distribute, and/or to knowingly possess with intent to distribute, more than one kilogram of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Counts two through twelve each alleged, against various of the defendants, specific instances of heroin distribution, possession with intent to distribute, and/or aiding and abetting such distribution or possession , in affront to 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. § 2.

Initially, each of the four defendants-appellants pleaded not guilty to all charges. Ultimately, however, each pleaded guilty to a single count of the superseding indictment, in exchange for the dismissal of all other counts. Paris Neal, Dorothy Neal, and Olusoga each pled guilty to count one (conspiracy), whereas Ross pled guilty to count seven (possession of, distribution of, and aiding and abetting the possession and distribution of, 25 packets of heroin totaling 1.9 grams on November 6, 1996). On January 9, 1998, Paris Neal incurred 216

months of correctional confinement, to be followed by five years of supervised release. On January 30, 1998, the sentencing court condemned Olusoga to 160 months in federal custody plus five years of subsequent supervised release, and consigned Ross to 82 months of incarceration to be served prior to a three year supervised release term. On February 6, 1998, Dorothy Neal received 180 months of imprisonment, plus a consecutive five year period of supervised release. Each defendant timely appealed his or her sentence.

Paris Neal has disputed the district' courts finding that he occupied a "managerial or supervisory" role in a criminal enterprise involving five or more persons, which added three criminal history points to his sentencing calculation[1] U.S.S.G. § 3B1.1(b). The United States must prove the propriety of an "aggravated role in the offense" enhancement under section 3B1.1 by a preponderance of the evidence. *United States v. Stubbs*, 11 F.3d 632, 638

---

[1] The "aggravating role" guideline provides:

Based on the defendant's role in the offense, increase the offense level as follows:

s If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

b If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

c If the defendant was an organizer, leader, manager, or supervisor of any criminal activity other than described in (a) or (b), increase by 2 levels.

U.S.S.G. § 3B1.1 (boldface in original)

The district court declined to impose a four-degree "organizer or leader" offense level increase against Paris Neal.

(6th Cir. 1993). A sentencing court's "role in the offense" finding is scrutinized for clear error. *United States v. Gort-DiDonato*, 109 F.3d 318, 320 (6th Cir. 1997). The Commentary to section 3B1.1 lists some considerations material to the "aggravated role in the offense" inquiry:

> Factors the courts should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning and organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.

U.S.S.G. § 3B1.1, comment. (n.4).

This circuit has remarked that the Sentencing Commission did not, via note 4, mandate a catalogue of required elements. *United States v. Ospina,* 18 F.3d 1332, 1336-7 (6th Cir. 1994).

Paris Neal has contended that the prosecution failed to evince that he controlled his accomplices or received a larger share of the criminal proceeds that other participants. However, the testimony of Task Force Officer Jeff Cox, an agent who participated in Dorothy Neal's interview and listened to Paris Neal's recorded oral confession, proved beyond controversy that the Neals had occupied a joint managerial or supervisory role in their large-volume heroin distribution syndicate.

The November 1, 1997 version of the United States Sentencing Guidelines controlled the instant sentencing judgments, and therefore is cited throughout this decision.

As related by Officer Cox, the Neal's revelations evidenced that, throughout the conspiracy's duration, they were responsible for acquiring, storing, processing, and packaging the ring's narcotics, as well as administering its income and expenditures. The provided their assistants, including Ross, Reed, and Williams, with electronic pagers to facilitate trade, and with packets of processed heroin for retail distribution to addicts. Buyers regularly placed orders by telephoning one of the Neals' home telephone numbers, which were sometimes taken and/or filled by one of their subordinates, including Ross. The Neals actively recruited accomplices, such as Ross. Those admissions were sufficient to impute a "manager or supervisor" role to Paris Neal. *See United States v. Ledezma*, 26 F.3d 636, 644 (6th Cir. 1994) (explaining that proof that a defendant had instructed distributors and directed deliveries of contraband supported a "manager or supervisor" finding). The district court's crediting of Officer Cox's testimonial synopsis of the Neal's disclosures is not subject to appellate review. *See* 18 U.S.C. § 3742(e); *United States v. Gessa*, 57 F.3d 493, 496 (6th Cir. 1996).

Paris Neal has also faulted the initial forum for allegedly neglecting to articulate precise factual findings supportive of his aggravating role enhancement. *See United States v. Range*, 982 F.2d 196, 198 (6th Cir. 1992). However, the sentencing transcript belied that contention:

> MR. PARKER [AUSA]: Your Honor, the proof shows that Mr. Neal and Mrs. Neal obtained the heroin in bulk form from Chicago. They cut it. They had DeWayne Reed, Harold Williams, Eugene Ross, as well as themselves make deliveries, return phone calls, set up appointments. During the course of the investigation, several controlled

> purchases were made, all through the same phone number where Paris Neal lived. Mr. Neal and Mrs. Neal were responsible for getting the heroin from Chicago and paying for it, and Your Honor, I would submit that Mr. Neal falls squarely within a leader and an organizer, as set forth in the sentencing guidelines, and I would submit that to the Court.
>
> THE COURT: The Court believes that facts have been shown with respect to 3B1.1(b), that is that the defendant was a manager or supervisor and that the activity involved five or more participants. The objection is overruled.

Accordingly, the trial bench adopted the prosecutor's succinct encapsulation of the record proof pertinent to Paris Neal's "managerial or supervisory" enhancement. Thus, no error of fact or law infected the sentencing court's imputation of a three point offense score augmentation to Paris Neal for his aggravating role in the offense.

Abayomi Olusoga has contested the sentencing forum's attribution to him of at least one kilogram of heroin, which produced an offense level of 32. U.S.S.G. § 2D1.1(c)(4). The sentencing court's assignment of a drug quantity must be supported by a preponderance of the evidence, and is reviewed for clear error. *United States v. Hodges*, 935 F.2d 766, 769-70 (6th Cir. 1991). A sentencing bench's narcotics quantification is not clearly erroneous if it was anchored in proof which "bore more than a minimum indicium of reliability beyond mere allegation." *Gessa*, 57 F.3d at 496 (internal quotations omitted). Furthermore, the trial court may adopt a reasonable estimate of drug quantity if a precise tabulation is impractical; however, it must ensure that "the defendant is more likely than not *actually* responsible for a quantity greater than or equal to the

quantity for which [he] is being held responsible." and should "err on the side of caution." *United State v. Walton,* 908 F.2d 1289, 1302 (6th Cir. 1990) (emphasis in original).

Olusoga has, in essence, attacked the credibility of Dorothy Neal, who testified for the prosecution at his sentencing hearing. The trial court's estimate of the drug quantity chargeable against Olusoga was founded upon Dorothy Neal's testimony that he sold bulk heroin in units of 50, 100, 200 or 400 grams each, coupled with her recollection of the number and weight of unites purchased by the Neals. Olusoga has referenced inconsistencies in her testimony, especially her initial representation that the Neals purchased heroin from him on at least twenty occasions between approximately October 18, 1996 to January 18, 1997, in a total volume possibly as great as 3,750 grams; which conflicted with her subsequent attestations that the Neals had secured heroin from Olusoga approximately ten times in a total sum potentially as low as 1,200 grams.

Dorothy Neal's lowest, and most precise, estimate of the uncut heroin quantity secured by the Neals from Olusoga was developed during cross-examination by Ross' defense counsel. She revealed that, in October 1996, they received three shipments weighing 50 grams, 100 grams, and either 100 or 200 grams, respectively, in November 1996, the accepted another three deliveries, weighing 400 grams, 100 grams, and perhaps as little as 50 grams, respectively; in December 1996, they received at least two shipments weighing 100 grams apiece and perhaps an additional 50 gram unit; and in January 1997, they accepted two deliveries weighing 100 grams each. Construing that testimony most favorably for the defendant, the Neals acquired from Olusoga at least 250 grams in October, at least 550 grams in November, at least 200 grams in December, and 200 grams in January,

which tallied at least 1,200 total grams. Accordingly, no clear error inhered in the lower court's factual conclusion that Olusoga was responsible for trafficking at least one kilogram of heroin through the Neal cartel.

Eugene Ross has asserted that the lower court committed clear error by declining to decrease his offense level by four points pursuant to U.S.S.G. § 3B1.2 for occupying a "minimal" role in the Neal association, but instead awarding him only a two degree decrease for him "minor" participation therein.[2] The accused must prove a proposed mitigating factor, such as his alleged "minimal" role in the offense, by a preponderance of evidence. *United States v. Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993).

The Commentary to § 3B1.2, note 3, recites that "[f]or purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." Note 1, concerning the classification of "minimal" participants, postulates that "[i]t is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of the group. Under this provision, the defendant's lack of knowledge or

---

[2] The Sentencing Guideline governing "mitigating role" reductions posits:

Based on the defendant's role in the offense, decrease the offense level as follows:

a If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.

b If the defendant was a minor participant in any criminal activity decrease by **2** levels.

In cases falling between (a) and (b), decrease by 3 levels.

U.S.S.G. § 3B1.2 (boldface in original).

understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant."

Dorothy Neal testified at Ross' sentencing hearing. She revealed that Ross moved into their home in late August 1996. Although he did not initially participate in the heroin conspiracy, he began accepting telephone orders for the Neals about four weeks into his stay. Several weeks thereafter, he began vending and transporting narcotics at the Neals' behest. He surrendered the proceeds of his dope dealing to the Neals, who then compensated him for his efforts. Ross had occasionally observed the Neals packaging heroin for street distribution. Ross' participation escalated from approximately one deliver per week to a transaction every two or three days. By December 1996, the Neals ranked Ross as a key player in the operation, which prompted them to entrust him with the combination to the safe in which they stored their narcotics. However, Ross ceased peddling drugs for the Neals in mid-December 1996, and departed Memphis in January 1997.

Ross has maintained that the sentencing judge should have deemed him a "minimal" participant because he did not intend to join a heroin ring when he moved into the Neal residence, he had avoided any participation in the distribution scheme for four weeks and became entangled in the concerted felonious activities only gradually, he withdrew completely from the conspiracy after only six weeks of serious involvement, and he was unaware of the full scale of the Neal's long-term narcotics enterprise. Ross has averred that, compared to the overall volume dispensed and the duration f the Neal association (approximately 20 kilograms of heroin dispersed over a period exceeding two years), his purportedly modest contribution during a brief period

wherein only approximately 600 grams of heroin were trafficked should be construed as "minimal" participation.

Ross' assignment of clear error to the lower bench's assessment of a "minor" rather than a "minimal" role offense level reduction misconstrued that court's supporting rationale. The initial forum did *not* charge *all* heroin trafficked by the Neal cartel between 1993 and January 1997 against Ross. Rather, it assigned responsibility to him only for the approximately 600 grams which the Neal syndicate traded during the short period of Ross' active membership. Ross has not controverted that quantification. His brief participation relative to the conspiracy's full duration, and/or his ignorance of its longevity and total business transacted, did not detract from the significant degree of his contribution, and/or his knowledge of the scope and structure of the operation, *during the period of his involvement.* As such, Ross clearly was not a "minimal" participant respecting the segment of the conspiracy towards which he contributed and for which he was punished, even if he was a "minimal" participant in the context of the overall conspiracy. Accordingly, no clear error contaminated the district court's election to award Ross a "minor" participant, rather than a "minimal" participant, mitigating role-in-the offense sentence reduction.

Dorothy Neal has disputed her sentence on two theories. First, she has averred that the trial judge legally erred by declining to bestow upon her a more generous "substantial assistance" downward departure from her court-pronounced guidelines range of 324 to 405 months in correction detention. The district court in part granted the United States' downward departure motion under 18 U.S.C. § 3553 and U.S.S.G. § 5K1.1 in consideration of Dorothy Neal's substantial assistance in the investigation and prosecution of her erstwhile

criminal associates, reducing her sentence to 180 months of institutional confinement. In imposing that penalty, the trial judge commented that he would not depart below the ten year statutory minimum prison sentence mandated by 21 U.S.C. § 841(b)(1)(A)(i) for an offense involving at least one kilogram of a substance containing detectable heroin.

A sentencing court's *decision to depart* from the guidelines range is reviewed for abuse of discretion. *Koon v. United States*, 518 U.S. 91, 98 (1996). However, a district court's election *not* to depart from the guidelines is *per se* within proper discretionary bounds and thus is insulated from appellate scrutiny, unless the initial forum legally erred by failing to recognize its authority to depart. *United States v. Coleman*, 138 F.3d 616, 168 (6th Cir. 1998); *United States v. Landers*, 39 F.3d 643, 649 (6th Cir. 1994). Dorothy Ross' accusation that the trial judge misunderstood his discretionary authority to depart below the statutory mandatory minimum imprisonment term was contradicted by his statement on the record that "I do not grant the motion under 3553, which is a motion that would allow the Court to go below the statutory minimum, which is 10 years." Thus, the court manifested comprehension of its power, as prescribed by 18 U.S.C. § 3553(e), to depart below the statutory minimum, but declined to do so in the exercise of its non-reviewable discretion.[3]

---

[3] In contesting the initial court's failure to reduce her prison term below the statutory minimum duration, Dorothy Neal has claimed that because her 180 month sentence was outside the guideline's "heartland," its determination should be evaluated for abuse of discretion. She has asserted that her sentence should be vacated as unreasonable because, despite her substantial assistance to the government, she received a more severe punishment that Olusoga, the key target of the investigation (who incurred 160 months in federal custody); and/or because the district court purportedly applied some alleged unknown arbitrary mathematical formula to compute her sentence. In the first instance, the defendant's "heartland"

Second, Dorothy Neal has urged that the sentencing court committed plain error by invoking information which she had proffered during interviews with investigators as a cooperating witness, and/or provided during testimony introduced at her co-conspirator's sentencing hearings. She has cited section 1B1.8(a) of the sentencing guidelines, which pronounces:

> Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, *and as a part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant*, then such information shall not be used in determining the applicable guideline range, *except to the extent provided in the agreement.*

U.S.S.G. § 1B1.8(a). (Emphasis added).

---

contention was misconceived. In Koon v. United States, 518 U.S. 81 (1996), the Supreme Court recognized that, in cases which are sufficiently unique from those which occupy the sentencing guideline's "heartland," the sentencing court may exercise discretion to depart from the guidelines strictures. Id. at 98-99. Under Koon, the government's appellate challenge to a district court's allowance of a downward sentencing departure triggers review for abuse of discretion. Id. By contrast, Dorothy Neal's contention that the district court should have accorded her a *more favorable* downward departure is in essence an assault against the trial court's election *not* to depart, which is nonreviewable. In any event, the defendant's charge that the sentencing court abused its discretion was ill founded. Olusoga's more lenient penalty was the product of his relatively mild criminal history, which placed him in criminal history category II, as compared to Dorothy Neal's long and eventful criminal career, which consigned her to category VI, the highest possible criminal history rank. Furthermore, the defendant cited nothing in the record which confirmed her speculation that the district court employed some type of arbitrary mathematical formula to calculate her punishment.

The district court relied upon Dorothy Neal's incriminating statements as summarized in her presentence report. *See United States v. Wilson* 954 F.2d 374, 377 (6th Cir. 1992) (explaining that a sentencing forum may utilize a presentence report's memorialization of a defendant's implicating declarations to a probation officer). Dorothy Neal neglected to object to the sentencing judge's dependence upon her presentence report. Hence, she has forfeited an appeal anchored in any error, except *plain* error, connected to the sentencing court's usage of her presentence report. FED.R.CRIM. P. 52(b); *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998) (mandating that an unpreserved sentencing objection may justify appellate relief only if the defendant has proved "(1) that an error occurred in the district court; (2) that the error was plain, *i.e.*, obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings."), *cert. denied*, 119 S.Ct. 1278 (1999)..

No plain error infected Dorothy Neal's sentencing because nothing in the record indicated that the government had agreed not to sentence her based upon self-incriminating evidence which she supplied as a cooperating witness. She did not include her FED. R. CRIM. P. 11(e) written plea agreement, or any other proof of any pertinent provision of her plea bargain, in the Joint Appendix. By contrast, the record reflected that law enforcement authorities recited *Miranda* warnings to her prior to her confession, which included the admonition that anything she might say can and will be used against her in court. *See Miranda*, 384 U.S. at 469. Therefore, the defendant has failed to prove that the trial court committed any sentencing error, or if it had, that such error was "plain."

This reviewing court has carefully considered all arguments advanced by each appellant. Because none was meritorious, the district court's judgments of sentence are **AFFIRMED.**